IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1469

TIME, INC.,

Petitioner,

v.

JACK WASSERMAN,

Respondent.

REPLY MEMORANDUM FOR PETITIONER

As pointed out in the Petition for Certiorari, this case is one of the three pending "deliberate omission" libel cases against the petitioner Time, Inc., the other two cases being the companion case of *Ragano* v. *Time*, 302 F. Supp. 1005, and the case of *Pape* v. *Time*, 419 F.2d 980. Since the Petition was filed on April 23, 1970, this Court has granted Time's petition for certiorari in *Pape* on April 27, 1970, No. 1309 (38 L.W. 3419), and Time's appeal in the *Ragano* case is still awaiting decision by the Fifth Circuit.

In an effort to avoid the effect of the intervening grant of certiorari in *Pape*, Respondent's opposition focuses on irrelevant phrases taken out of context in an effort to suggest that a full-blown jury trial is required in this case. In so doing he not only seeks to avoid the clear import of this Court's decisions recognizing that expensive litigation, in the absence of any showing of actual

malice, has a "chilling effect" on free speech—*Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)—but he also seeks to impose this unconstitutional burden on Petitioner at the very time when this Court has before it in *Pape* substantially the same issues presented by this case.

As set forth in detail in Appendix F to the Petition, the First Amendment guarantee of free speech requires that summary judgment be granted as soon as it becomes clear that the plaintiff cannot establish actual malice. Respondent has consistently failed to make any showing—much less a showing with "convincing clarity"—that the Time article in question was published with "knowledge that it was false" or with "serious doubts as to the truth of [the] publication." *New York Times*, 376 U.S. at 280; *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). He has admitted that the September 30 luncheon was announced in advance in such a manner that newsmen present could overhear (W. Dep., App. 264);* that he posed willingly for pictures at the restaurant (W. Dep., App. 265-67); that he talked to reporters about the stories they would write concerning the luncheon (W. Dep., App. 266-67); and that one of the members of his group paid the luncheon bill of those same reporters (W. Dep., App. 267). In addition, he has admitted that following the luncheon he expressed his appreciation to the reporters for their coverage of the incident, telling them in substance that their stories were "great." (W. Dep., App. 270) Significantly, the very news story which Respondent characterized as "great"—written by Gerald Kessler and appearing in the New York Daily News on October 1,

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* As in the Petition for Certiorari, the deposition of Wasserman is referred to as "W. Dep.", the depositions of petitioner's employees are referred to as "T. Deps.", and the appendix printed below which is included in the record certified to this Court is referred to as "App." The exhibits to the depositions are included in the original record below which has also been transmitted to this Court.

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1966 (W. Dep., App. 266-67)—was relied upon by Petitioner in preparing its article. And, that "great" news story had commented upon "the general gaiety that pervaded the restaurant"; had observed that the "move [to the restaurant] was obviously staged" and "seemed to be rehearsed"; had reported the group's taunt—"Why don't they arrest us now?"; and had expressed the view that those attending the second luncheon were "apparently making up for the food they missed when the Sept. 22 dinner party . . . was interrupted by the police." (T. Deps. ex. 2, App. 172-74).

The only substantial difference between that "great" news story and the Time article was Time's failure to identify Respondent as an attorney. That failure is all that is in dispute here. That is what Respondent complains of, and that is the peg on which the court below hung its reversal of the summary judgment for Petitioner.

Contrary to the impression Respondent seeks to convey (Opp. p. 8 and n.8, p. 12), the Time article did not in text refer anywhere to him, let alone charge that he had been arrested, released on bail, or refused to testify before a grand jury. Instead—as background to the news event being reported (*i.e.*, the luncheon of September 30, 1966)—the article merely outlined the arrest, background, and activities of the 13 Cosa Nostra hoodlums arrested on September 22, 1966. All of that led up to the main news event—the September 30 luncheon, for which the photograph spoke for itself. What Respondent in reality is complaining about is not Petitioner's article, but rather, his own lack of judgment. This was not, as Respondent's own testimony shows, a simple luncheon attended by an attorney and his clients. This was a staged performance with Respondent playing the representative role of a Cosa Nostra hoodlum.

The editorial process—involving a researcher, writer, and editor—followed by Petitioner with respect to the challenged article is set forth on pages 8-9 of the Peti-

tion, and is not disputed by Respondent. The testimony of all three Time employees responsible for the article that they believed the article was true when published (T. Deps., App. 69, 101, 125) is also not disputed by Respondent. Nor does Respondent dispute the testimony of all three that they knew he was an attorney when the article was written (T. Deps., App. 67-68, 92, 120, 141); that they saw nothing wrong with Respondent, *as an attorney*, going out to lunch with his clients (T. Deps., App. 33, 56, 75-76, 81-82, 117); that they did not believe he was acting as an attorney when he participated in the September 30 luncheon (T. Deps., App. 79, 99, 122, 146); and that they construed the September 30 luncheon to be a publicity stunt, designed to show defiance of law enforcement authorities, with all participants, *including Respondent*, representing those who attended the first luncheon. (T. Deps., App. 72-74, 79, 99, 107, 122, 127-28, 144-47)

In view of these uncontradicted facts, the present case cannot be satisfactorily distinguished from *Pape*. Both involve the deliberate omission of matter which the publisher honestly believed was irrelevant. In *Pape*, the omission concerns the absence of any reference to the fact that the stated acts of police brutality were allegations in a complaint; in *Wasserman*, the omission concerns the absence of any reference to the fact that one of the active participants in the staged luncheon happened to be an attorney. Both involve the same careful editorial process which preceded the decision to omit the challenged matter. Both involve the substitution by lower courts of their own editorial judgment and discretion for that of the publisher, solely because of the omission. Thus, both cases, in identical settings, squarely present the question whether the deliberate omission of a known fact can constitute "actual malice" in the Constitutional sense.

In the light of these circumstances, the instant Petition should be granted and assigned for argument with

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Pape. In the alternative, it is respectfully suggested that, at the least, the Petition be held pending this Court's decision in *Pape*.

Respectfully submitted,

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May 20, 1970